Supreme Court, U.S.
FILED
FEB 20 2002

(3)

No. 01-956

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel.
JOHN A. KING, D.O.,

Petitioner,

versus

HILLCREST HEALTH CENTER, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY

DAVID J. SCHENCK
Counsel of Record
STANFORD PURSER
HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, TX 75201
(214) 939-5500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1188

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF REPLY 1

REPLY 2

I. The Conflict in the Circuits Regarding the Meaning of "Based Upon" Under 31 U.S.C. § 3730(e)(4)(A) Is Important And Should Not Be Ignored 2

A. The *Qui Tam* Provisions of the FCA Play an Integral Part in Achieving the Act's Purpose – to Combat Fraud – and Their Interpretation Is Not of Limited Consequence 2

B. There Is No Basis For A Deemed Waiver Under the Circumstances 5

II. This Court Should Also Address the Issue of How Much "Information" an "Original Source" Must Voluntarily Disclose Pursuant to Section 3730(e)(4)(B) 6

A. The Tenth Circuit's Opinion Conflicts With a Decision of the District of Columbia Circuit .. 6

B. There Is No Justification for the Tenth Circuit's Holding 8

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Eberl's Claim Service, Inc. v. C.I.R., 249 F.3d 994 (10th Cir. 2001) 6

Metz v. Merrill Lynch, Pierce, Fenner & Smith, 39 F.3d 1482 (10th Cir. 1994) 6

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 3

United States ex rel. Precision Co. v. Koch Indus., 971 F.2d 548 (10th Cir. 1992) 5

United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994) 7

STATUTES

31 U.S.C. § 3730(b)(2) 1, 2

31 U.S.C. § 3730(e)(4)(B) 7

OTHER

Senate Report No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 3

SUMMARY OF REPLY

Respondents urge that the conflict among eleven Circuits over Congress' intended meaning of the term "based upon" is "one whose consequences are quite limited." Opp. Brief at 6-7. Quite to the contrary, a division as wide as this one is highly significant especially where, as here, it operates to bar claims of fraud against the United States and to create a disincentive to make the fraud known. This is all the more true where, as in the Tenth Circuit, parallel language of the same section has been read to exacerbate the problem. Also, contrary to Respondents' assertions, the Tenth Circuit reading of the original source disclosure provisions in this case would require disclosure of all the relator's "information" in conflict with the District of Columbia Circuit, the language of the Act and the recognized intentions of Congress.

Finally, for unknown reasons, Respondents also appear to accuse Petitioner of misrepresenting the fact that he complied with 31 U.S.C. § 3730(b)(2), the provision outlining filing and service requirements for relators.[1] Opp. Brief at 2. Respondents' accusation is in error

---

[1] That section requires the relator to file the complaint under seal and to serve a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses . . . on the Government." 31 U.S.C. § 3730(b)(2). Petitioner more than satisfied this requirement when he timely and undisputedly served the Government with his complaint and simultaneously served additional information "organized in notebooks" for the Government's convenience. *E.g.*, Appellant's App. before the Tenth Circuit at 435. That fact is undisputed and undoubtedly

and totally irrelevant, as it is undisputed that Petitioner complied with this section.[2] Indeed, the issue was never considered below and is not raised here on certiorari.

In all events, it is undisputed that the disclosure under 3730(b)(2) was proper and timely and no question concerning compliance with that section was considered below or raised here. Thus, the *ad hominen* is totally irrelevant and serves only to waste the Court's time.

REPLY

I. The Conflict in the Circuits Regarding the Meaning of "Based Upon" Under 31 U.S.C. § 3730(e)(4)(A) Is Important And Should Not Be Ignored

A. The *Qui Tam* Provisions of the FCA Play an Integral Part in Achieving the Act's Purpose – to Combat Fraud – and Their Interpretation Is Not of Limited Consequence.

Notwithstanding the fact that Congress chose the language and had a purpose in mind undeniably at odds

---

known to Respondents, as they selectively quote the same page of Appellant's Appendix later in their Counterstatement.

[2] Thus, to the extent Respondents assert that Petitioner did not timely provide the necessary parties with "a 'written disclosure of substantially all material evidence and information' he possessed" or otherwise comply with the service requirements, they are knowingly wrong. Pet. Brief at 3 (quoting 31 U.S.C. § 3730(b)(2)). Rather, it would appear that Respondents are referring to an earlier erroneous statement, long ago corrected in the District Court, to the effect that the notebooks had been served *before* the filing.

with the Tenth Circuit's construction, Respondents assert that the conflict among eleven circuits over the meaning of "based upon" is "one whose consequences are quite limited" that should go unresolved. Opp. Brief at 6-7. That statement and the supporting arguments related to it, among other things, reveal a fundamental misunderstanding of the FCA and the role of *qui tam* suits.

No one can debate that the FCA exists solely to combat fraud against the Government. The *qui tam* provisions play a central role in that pursuit. As this Court noted almost sixty years ago, "one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (citation omitted).

Indeed, *qui tam* suits address "perhaps the most serious problem plaguing effective enforcement" of the FCA: a "lack of resources on the part of Federal enforcement agencies." S. Rep. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272. Congress amended the FCA in 1986 to "encourage *more* private enforcement suits." *Id.* at 23-24, 1986 U.S.C.C.A.N. at 5288-89 (emphasis added).

Nonetheless, Respondents claim that the provisions governing who may bring a *qui tam* suit are relatively unimportant and as a result do not merit the Court's attention. Petitioner respectfully urges the Court to scrutinize Respondents' misguided reasoning.

First, the interpretation of "based upon" has serious consequences. Too broad a definition needlessly bars private enforcement suits that should otherwise go forward. In light of the enormous consequences of fraud committed against the Government, no eligible relator should be blocked.

Respondents counter that every legitimate relator can still proceed provided he satisfy the erratically narrowing "original source" exception. That might be true where the size of the exception matches the breadth of the trap; however, as this case vividly demonstrates, the Tenth Circuit has adopted interpretations that bar too many under the "based upon" umbrella, yet excuse far too few as "original sources." Thus, legitimate informers are kept from pursuing fraud allegations and also risk prosecution and other dire consequences should they come forward. That would be bad enough where the Department of Justice elects to intervene (at least the perpetrator can still be made to repay the fraud); but it is wholly unacceptable, in a case like this, where the Department opts out.

Respondents' next argument – the notion that the issue does not matter because it does not affect the "substantive" provisions of the FCA or the "concomitant obligations of the government contractors" – is wholly irrelevant. Opp. Brief at 9. If the *qui tam* provisions were completely read out of the FCA – a result we assume even Respondents would agree is wrong – the substantive provisions of the FCA and the obligations of government contractors would not be affected. Would that result therefore be "inconsequential" too? The entire point of the *qui tam* provisions is to encourage private cooperation

in finding and fighting fraud, not to define the substantive rights of the Government or its contractors.

For much the same reasons, Respondents' final argument – that there are more "significant" conflicts "of substantive consequence" involving the "rights of defendants and the United States" – completely misses the mark. The precise contents of the "substantive" FCA are only important to the extent someone is enforcing them. The *qui tam* provisions are meant to ensure that someone always is.

Perhaps Respondents really intend to suggest that claims of fraud in connection with Medicaid and/or Medicare billing are of no real moment. Be that as it may, it should be recalled that the rule laid down in the Tenth Circuit will apply to all Government contractors, including operations at Lockheed Martin, Boeing, Raytheon, and the Los Alamos National Laboratory, to name just a few residing within the Tenth Circuit.

B. There Is No Basis For A Deemed Waiver Under the Circumstances

Respondents also urge the Court to leave the conflict unresolved based on a supposed waiver of the issue as a result of Petitioner not pressing the District Court to adopt his reading of "based upon." Respondents do not remind the Court that the question was, as Respondents themselves argued to the District Court, Appellant's App. at 50, already long settled by binding Tenth Circuit precedent. *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992). Neither the District Court nor even the Tenth Circuit panel had any power to adopt any

other reading. *Eberl's Claim Service, Inc. v. C.I.R.*, 249 F.3d 994, 1003 (10th Cir. 2001) (stressing binding nature of prior panel precedent).

Nonetheless, Petitioner did raise the issue before the panel, suggesting that it should call for an en banc poll. And, following the panel's adverse decision, Petitioner sought rehearing en banc, presenting the issue directly. Respondents cite no authority, nor has any been discovered by Petitioner, that would support a finding of waiver under these circumstances. *Cf. Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482, 1489 (10th Cir. 1994) (rejecting waiver where argument would have been barred).

II. This Court Should Also Address the Issue of How Much "Information" an "Original Source" Must Voluntarily Disclose Pursuant to Section 3730(e)(4)(B).

A. The Tenth Circuit's Opinion Conflicts With a Decision of the District of Columbia Circuit.

Contrary to Respondents' assertions, the Tenth Circuit's holding clearly requires a total disclosure prior to filing suit. To argue otherwise ignores the facts of this case and the practical effect of the opinion. Dr. King, through his counsel, disclosed to the Government prior to filing his *qui tam* action all the information he possessed concerning the fraud allegation except the identities of the parties – which had already been publicly disclosed in Dr. King's employment retaliation suit against Respondents. Nonetheless, the Tenth Circuit ruled that Dr. King failed to comply with the "original source" voluntary pre-

filing disclosure requirement because he did not also name any parties. Pet. Brief at 14a-15a. In effect, the Tenth Circuit denied Dr. King "original source" status because he did not provide every material fact to the Government prior to filing suit.

Respondents wrongly contend that this holding does not conflict with the District of Columbia Circuit. As noted in the Petition, "[a]t bottom, the Tenth Circuit ruled that 'the information' to be provided under section 3730(e)(4) means all the information the relator possesses." Pet. Brief at 12. Petitioner also noted that the original source provision uses the term "the information" three times in the course of one sentence and that the term presumably means the same thing each time. *Id.* Thus, the District of Columbia Circuit's interpretation of any of the three uses of "the information" bears on the Tenth Circuit's holding regarding the same term from the same statutory provision. The District of Columbia Circuit held that "the information" means "any essential element of the fraud transaction." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 647 (D.C. Cir. 1994). Obviously, "any" essential element does not mean "all" or "every" essential element. Unless Respondents believe that "the information" in section 3730(e)(4)(B) takes on varying meanings depending on which clause of the provision's sentence it appears in, the Tenth Circuit's broad construction of the term conflicts with the District of Columbia Circuit's narrower view.

B. There is no Justification for the Tenth Circuit's Holding

Respondents, like the Tenth Circuit, take the view that the "original source" voluntary disclosure requirement was meant to provide notice of fraud to the Government. Opp. Brief at 16-17. However, that position cannot be reconciled with the language or structure of other provisions in the False Claims Act, nor the history of the "original source" provision. The point of the exception is to protect relators, not to provide the Government with information already required to be disclosed under other FCA provisions. *See generally* Pet. Brief at 13-18.

CONCLUSION

For the foregoing reasons, and those contained in the Petition for Certiorari, the Writ should be granted.

Respectfully submitted,

DAVID J. SCHENCK
Counsel of Record
STANFORD PURSER
HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, TX 75201
(214) 939-5500